No. 89-380 (3)

In The

Supreme Court of the United States

October Term, 1989

CARL P. CALDWELL,

Petitioner,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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43 pp

QUESTIONS PRESENTED

All issues on which certiorari is sought have their root in a federal statutory claim that the mandatory retirement on November 30, 1979 of the then sixty-five year old Carl Caldwell, who had for, at least, seventeen years prior to that time served as the department head of the controller's operation for the state of Oklahoma for Southwestern Bell Telephone Company did not come within the 1978 enacted exception to the Age Discrimination in Employment Act for a "bona fide executive" retirement at age 65, 29 U.S.C. §631(c)(1).

1. Did the provision in Bell's pension plan in 1979 which required the suspension of benefits payments to a retiree during periods of reemployment within the AT&T group of companies technically render petitioner's benefits "forfeitable" so that Bell could not lawfully use the Section 631(c)(1) exception to the ADEA even though AT&T owned more than 80% of the stock of 34 of the 37 companies, no suspension of benefits because of reemployment was ever experienced with the three less than 80% owned companies and the 80% ownership test was contained in merely proposed regulations?

2. The trial court determined, on Bell's motion for summary judgment, that Mr. Caldwell was employed in a "bona fide executive capacity" within the meaning of the ADEA exception codified at 29 U.S.C. §631(c)(1). The court of appeals affirmed. The petitioner claims that he was improperly denied a jury trial although the issue is primarily one of statutory interpretation and no new material disputed facts are identified.

QUESTIONS PRESENTED (Cont.)

3. The trial court twice denied the plaintiff's untimely leave to amend its complaint to permit the complaint of alleged deficiencies in Bell's procedures in amending its pension plan after the 1978 amendments to ADEA. The court of appeals affirmed the trial court's denials of Caldwell's applications for leave to amend his complaint.

RESPONDENT'S AFFILIATED CORPORATIONS

SOUTHWESTERN BELL TELEPHONE COMPANY

Parent: Southwestern Bell Corporation

Affiliates:
SBC Administrative Services, Inc.
SBC Asset Management, Inc.
The Golf Club of Oklahoma, Inc.
Majestic Associates
SBC Corporate Services, Inc.
Gulf Printing Company
Times Journal Publishing Company
Metromedia Paging Services, Inc.
Autophone of San Antonio, Inc.
Southwestern Bell Mobile Systems, Inc.
Incorporated in Delaware
Incorporated in Virginia
Southwestern Bell Publications, Inc.
Southwestern Bell Yellow Pages, Inc.
Southwestern Bell Media, Inc.
Mast Advertising and Publishing, Inc.
Blake Publishing Company, Inc.
AD/VENT Information Services, Inc.
Southwestern Bell Telecommunications, Inc.
SBC Technology Resources, Inc.
Southwestern Bell Corporation-Washington, Inc.
St. Louis Health Center, Inc.
Southwestern Redevelopment Corporation II
Bell Communications Research, Inc.

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STATEMENT

This case arose out of petitioner's complaint of being forcibly retired at age 65 under the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. (ADEA). The courts below made several interpretative rulings involving the application of statutory and regulatory phrases such as "nonforfeitable", "bona fide executive", and "employer who maintained the plan" to the undisputed facts of petitioner's job and pension.

The trial court found that petitioner had been employed in a "bona fide executive capacity" within the meaning of 29 U.S.C. §631(c)(1), but that the pension benefits were not "nonforfeitable" within the meaning of that Section of the ADEA and the counterpart sections of the Code and ERISA, 26 U.S.C. §411(a)(3)(B) and 29 U.S.C. §1563(a).

The court of appeals affirmed the district court's holding on the applicability of the statutory phrase "bona fide executive" to petitioner's job but reversed on the statutory and regulatory meaning of the statutory terms "nonforfeitable" and "employer who maintained the plan" as they applied to AT&T's pension plan. The court of appeals held that on November 30, 1979:

> "it was simply impossible to derive firm definitions from the language of §411(a)(3)(B) of the Code or §203(a)(3)(B) of ERISA, 29 U.S.C. §1053(a)(3)(B) when the perimeters of such definitions were left by the same statutes to future action by the Secretary of Labor in regulations promulgated for the purpose." (Ct. App. Op., App. pp. 28 and 29)

The court

> "declined to hold Bell on November 30, 1979, to the technical exactitude of regulations which became effective on January 1, 1982, and retroactively to disqualify its plan provision where none of the regulatory agencies have seen any reason to reach such a conclusion." (Ct. App. Op., App. pp. 45 and 46)

Continuing, the court of appeals said

> "it would subvert the intent of the rule-making process, and ignore the realities of the extremely broad powers given to and being exercised by the Department of Labor with respect to defining the scope of these nonforfeitability provisions." *Id.*

Respondent opposes the petition as there is no reason for further review of this matter. The lengthy and well reasoned unanimous opinion of the Tenth Circuit rests on close analysis and sound reasoning. The court observed in its Order and Judgment that the case had "no precedential value and shall not be cited or used by any court". Additionally, the court observed that the "case presents a non-recurring issue since it is confined to periods prior to 1982." Respondent is aware of no conflicting decisions, no novel or important principles of law and no elements of great public interest.

Generally, Caldwell alleges that he was involuntarily and illegally retired at the age of 65 because of Bell's misapplication of the newly-enacted bona fide executive exception to his job. He urges that he was entitled to remain employed until he would have been 70 years of age. Petitioner has been in continuous receipt of his vested Bell pension benefits from 1979 through the present as well as Social Security retirement benefits.

On November 30, 1979, Carl Caldwell, having that month become 65 years of age, was retired from the position of General Manager-Comptrollers, State of Oklahoma, Southwestern Bell Telephone Company ("Bell"), after having held that department head job for seventeen years and after 44 years of service with the company. His annual expense budget was $7.5 million in 1976. When he retired, 441 employees reported directly to him. He was one of nine department heads who together with the General Manager for the State, an officer, operated the Oklahoma company, the State's largest private employer.

Defendant is a five-state regional operating telecommunications company. Prior to divestiture in 1984 and at the time of the commencement of this action, it was a wholly owned subsidiary of AT&T and the former employer of the plaintiff.

The following summarizes Bell's position on the three questions on which Petitioner Caldwell seeks this court's grant of the writ:

1. Defendant's pension plan benefits were at all times "nonforfeitable" as required by ADEA, ERISA and the Code. Neither the statutes nor the proposed regulations required the plan, on November 30, 1979, to alter the interchange of benefits provision which had been a standard part of the plans for AT&T system companies since 1913. The deletion of the two companies which AT&T owned less than 80% of their stock (and thus, did not come within the definition of "controlled group of corporations") from the suspension on reemployment reciprocal benefits in 1982 was done by amendment to the pension plan promptly when controlling regulations were

published in "final" form and the 1982 effective date for affected plans was established by publications of the Secretary of Labor and the Internal Revenue Service. (Ct. App. Op., App. pp. 36 and 37 and citations contained there and App. F)

2. The ADEA statutory phrase "employee employed in a bona fide executive capacity" found at 29 U.S.C. §631(c)(1) as further defined in regulations found at 29 C.F.R. §541.1 and 29 C.F.R. §1625.12 unmistakeably applies to petitioner's position as one of nine department heads for Bell's Oklahoma operation. Petitioner urged that the only "officer" of Bell in Oklahoma was also the only "bona fide executive." The district court's grant of summary judgment as affirmed by the court of appeals, acted in consonance with this court's established principles for the granting of summary judgment. No further review is necessary as there are no issues of material fact and substantive law was correctly applied.

3. Petitioner's claim that the courts below abused their discretion in twice not allowing his untimely amendment to the complaint should not be the basis for granting the writ. Petitioner raises, for the first time in his petition to this court, an alleged failure of review by Bell's board of directors in adopting in 1978, amendments to the pension plan made necessary or desirable because of changes in the law brought about by the amendment of ADEA making mandatory retirement at age 65 illegal. Petitioner's application to the district court seeking a right to amend the complaint identified only generally that the "plan was not properly amended." A review of the excerpts from the record contained in petitioner's

appendix shows no indication of the board of directors issue having been argued below. (See Pet. App. p. 158 and 163. See also the applicable sections of petitioner's brief in chief to the court of appeals reproduced as App. D hereto.) Petitioner's position ignores the language of Bell's plan, the overall content of the Benefit Committee minutes, the letter attachment to the minutes, the committee's formal resolution and the action of Bell's president. The records were furnished to Caldwell and to the court and were contained in the record available to the lower court prior to the court's ruling that the interest of justice did not require the granting of either of plaintiff's leaves to amend the complaint. Respondent respectfully urges that this court should leave those decisions undisturbed as no abuse of discretion has been shown.

ARGUMENT

The opinion of Judge Anderson for a unanimous Tenth Circuit was drafted in considerable detail and carefully addresses the issues for which the writ is sought. No real purpose will be served by a reiteration of the exposition of fact and interpretation of law on both the pension "forfeitability" and "bona fide executive" issues of statutory construction of the opinion reproduced in the first 56 pages of petitioner's Appendix. Reference is made to that opinion as a foundation and point of beginning for framing the controversy.

I.

Pension Benefits Were "Nonforfeitable"

The court of appeals described as something of a labyrinthine process the testing of "nonforfeitability" of §631(c)(1) against Bell's suspension of payments provision. (App. p. 19) The process leads to several statutes and the actions of the EEOC, the Labor Department and the Internal Revenue Service which occurred between the enactment of ERISA in 1974 and the adoption of "final" regulations on permissible suspensions effective in 1982. Bell was closely attuned to the rule making process to insure their plan's highly important qualified status. A review of Bell's pension manager's letter to the U.S. Department of Labor even forms a part of the reasoning used by the court in explaining its conclusions. (App. B) The court also observed that this petitioner at all times received pension benefits and never faced and never will face any realistic possibility of forfeiture. (Ct. App. Op., App. 16).

Comment on some of petitioner's arguments nonetheless seems appropriate.

First, at page 6 of the Petition it is stated that the court of appeals acknowledged that Bell's pension benefits were *not* "nonforfeitable" as required by 29 U.S.C. §631(c)(1). To the contrary, the court of appeals refused to interpret §631(c)(1) as requiring in 1979 the standard of the proposed regulations which were adopted and made effective by the regulations of the Secretary of Labor for plan years beginning in 1982. Contrary to petitioner's assertion, there is no statutory plain meaning to be given

to the phrase "forfeitable" as applied to permissible suspensions. In pension matters it has been and is still the law that suspensions during reemployment with "the employer who maintained the plan" are permissible.

Indeed, suspensions on reemployment by a Bell retiree with any of the 34 of the 37 companies in the system in 1979 was permissible even after the final regulations were adopted and Bell's plan was amended in 1982. Thus, petitioner's citation at page 7 to doctrines of this court in its decision last term in the case of *Public Employees Ret. Sys. of Ohio v. Betts*, 109 S.Ct. 2854 (1989) is misplaced. In *Betts* this court interpreted the meaning of the word "subterfuge" in 29 U.S.C. §623(f)(2) of the ADEA and reaffirmed its 1977 ruling that a plan adopted prior to the enactment of the ADEA cannot be a subterfuge. Such a plan does not violate the Act unless it discriminates in a manner forbidden by the substantive provisions of the Act.

Betts also held that cost justification standards for age differentiated benefits contained in EEOC regulations as a means of satisfying the statute's "subterfuge" test must be stricken as in conflict with the statute. Caldwell has not contended, nor in good conscience could he contend, that the distinction between permitted suspensions during reemployment among a "controlled group of corporations" and that slightly more expansive definition sought by Bell of companies who had an interchange of benefits agreement operates to discriminate against employees because of their age. Caldwell claims no substantive violation of ADEA by operation of the pension benefits suspensions. Nor does Caldwell urge that the Department of Labor regulations, finally adopted in 1982, were in conflict.

Just the opposite. The argument seems rather to be that because both the proposed and final regulations adopted the statutory "controlled group" test, Bell and others should have known and should have been held to that standard of law, apparently, from the date of statutory enactment. Caldwell's argument is one of timing, not substantive age discrimination and therefore, *Betts* does not have the application Caldwell suggests. Like the plan in *Betts*, however, Bell's interchange of benefits arrangements for the plans of the reciprocating companies date in some cases to 1913, long before the enactment of the statute in dispute. That arrangement cannot be a "subterfuge."

Petitioner's principle argument seems to be that since the Labor Department regulations on permissible suspensions, could not be and were not in conflict with the statutory terms "nonforfeitable" and "employer who maintained the plan" that the rule stated in the proposed regulations was applicable from 1978 and Bell's plan in 1979, at that time of petitioner's retirement, contained the possibility of an impermissible suspension.

This argument is addressed by the court of appeals in its first point. (App. 38):

> "First, it was apparent at the time of enactment that the interpretation of the nonforfeitability requirement in §631(c)(1) was not to be confined to the words of that statute itself. The statute fell within the context of similar ERISA and tax provisions. In acknowledgement of that fact, the EEOC expressly tied the interpretation of forfeitability under §631(c)(1) to criteria set forth in the tax statute (§411(a)(3)(B)). That statute was, in turn, subject to interpretation by the Department of Labor, as was its counterpart in ERISA."

It is uncontroverted that regulatory agencies cannot change the meaning of statutes by issuing overriding regulations. However, it is equally uncontroverted that Congress can and does, from time to time issue rule making authority to agencies and such is the case here. See §411(a)(3)(B). It is because of this specific Congressional grant of rule making authority including the direction to define "employer" that causes petitioner's reliance on the general definition of nonforfeitability in 29 U.S.C. §1002(19) not to be helpful.

Petitioner urges for the first time to this court, that regulations defining "accrual of service," apparently published in 1976, somehow were definitive of the suspension of benefits during reemployment issue. Borrowing a definition in the way petitioner suggests and urging its use by analogy is not consistent with pension law as applied by the IRS and the DOL. Additionally, "accrual of service benefits" during employment is not the same problem as "forfeitability of benefits" after active employment ceases. For example, recognition of "years of service" for accrual purposes is permitted, if not encouraged, among and between reciprocating companies (including Bell's interchange companies) because to do so confers benefits to transferring employees. Suspensions after retirement, arguably, take away benefits. Thus, after 1982, Bell's employees continued to receive service credits with the minority owned or non-control group interchange companies while suspensions of benefits during periods of reemployment with those same companies were deleted by amendment.

Petitioner asserts the court of appeals' theories to be "novel." In order, the six numbered points of the opinion (App. 38-44) may be summarized as follows:

1. In the enactment of ERISA, Congress expressly delegated broad rule making authority to the Department of Labor and the IRS to give definitions to such terms as "employer."

2. The powers given were exceptionally broad and they reasonably included the power to define interchange companies and reciprocal plans within the term "employer."

3. The definitional process of the terms occurred during the years 1978 and 1982 and the DOL expressly solicited and received input from Bell and others before finalizing the governing regulations.

4. Bell received a favorable determination letter from the IRS on the plan dated July 11, 1979 adding support and legitimacy to the reasonableness of AT&T's proposal and reliance on the rule making process.

5. There is no evidence suggesting any enforcement action by the EEOC, the Department of Labor or the Internal Revenue Service supporting petitioner's position, rather the lack of action supports Bell's position that they were entitled to have notice and an opportunity to comply before finality of the regulations.

6. Bell could readily have complied in 1979 but their position for broader inclusion of the interchange companies was reasonable in that the reciprocity of benefits program was inherently pro employee, it had been a part

of the system for decades and it was not a subterfuge to evade the ADEA exception.[1]

What is *novel* about any of those six points?

Certiorari should not be granted because the court of appeals' application of the substantive law was proper.

II.

Caldwell Worked in a "Bona Fide Executive Capacity"

Both the district court and the court of appeals correctly determined that petitioner's job was unmistakeably one of the few top level management jobs intended by Congress to be included in Section 631(c)(1). This court's attention is invited specifically to both lower court opinions (App. 1-15 and App. 76-77) for detailed application of the legislative history and published regulations to the supervisory and managerial responsibilities of Mr. Caldwell in his comptroller's job with a $7.5 million budget and direct supervision of 441 employees. The job description in the record was approved by petitioner himself. On such undisputed facts the issue is one of statutory interpretation and, as such, summary judgment was proper. *State of Okla. ex rel. Dept. of Human Services v. Weinberger,* 741 F.2d 290, 291 (10th Cir. 1983) and *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505 (1986).

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[1] Petitioner suggests that for a Bell employee to be eligible for interchange benefits (apparently among all 37 of the system's companies) a management arranged transfer is probably required. That suggestion is asserted without factual or documentary basis in the record nor was it argued below. A more detailed response is thought to be inappropriate.

Caldwell's arguments about evidentiary standards at pp. 46 and 47 of his Petition exhibit confusion about proper evidentiary standards for jury consideration.

Moreover, it is clear from the facts he chooses to discuss at pp. 47 *et seq.* that Caldwell once again urges that Bell's perception of his job within the corporate structure is relevant (the internal perception). The lower courts' held that Congress and the published regulations intended an objective, market place or external view of the job's responsibilities when testing the proper application of the exception to the job in dispute.

Because Caldwell worked for such a large company, even though he was not an officer and was on a third tier of reporting to the head of Bell, he, nonetheless, as one of nine department heads in one of the five states, was in the top .05 percent of management. His job was properly found to have been in the top level (not middle) of management. No facts urged in the petition were omitted below nor are they disputed.

Finally, the argument that because Mr. Barnes, Bell's CEO, was continued as Chairman and CEO after age 65 mandatory retirement in 1986 raises new factual allegations for the first time. These allegations are not part of the record before either the district court or the court of appeals. They are raised here for the first time and, therefore, should be ignored in considering the merits of the petition for a writ.

III.

Trial Court's Denials of Leave to Amend Complaint Were a Proper Exercise of Discretion

The discretion of the lower court should be left undisturbed absent a showing of abuse. No adequate

showing was made to the trial court nor the court of appeals. Petitioner's attempt to urge here, for the first time, that Bell's board of directors should have, but did not, review plan amendments in 1978 is, again, an attempt to urge facts not in the record and theories not advanced below.

Whether or not the board approval was appropriate depends on the reasons for changes in the pension plan. The plan itself states the board's approval is not also necessary where amendments are required because of changes in the law. The 1978 Benefits Committee minutes (App. 173) and the letter sent by its Chairman to Bell's President establish that the plan amendments in question were made necessary or desirable because of 1978 amendments by Congress to the ADEA. As stated by the Chairman of the Pension Committee in the letter to the President (App. 175-176) review by the Board was not required. Caldwell does not dispute that the plan amendments recommended for adoption by the Benefit Committee to the President of Bell were substantively required by changes in the law. Rather, he seizes on a single phrase in the Benefit Committee minutes and juxtaposes it with a statement in the letter to the President that might be in conflict. Caldwell's position was not detailed to the district court as a review of the relevant Appendix material will show.

Leave to amend was sought at the trial court level on Caldwell's general complaint of "improper procedure" (no specific mention was made of the lack of alleged necessary review by the board of directors). Petitioner also claimed below that the committee acted without a quorum in attendance when it met to determine Caldwell's retirement. Apparently, petitioner elected not to urge the lack of a quorum issue here.

The district court acted properly after reviewing briefs and the theories and explanations then furnished on the

"improper procedures" claim. Bell respectfully requests that it is appropriate and desirable that this court leave the matter undisturbed since no abuse of that court's discretion has been shown.

CONCLUSION

For the reasons urged, this Court should not issue a Writ of Certiorari on any of the questions presented.

Although the "nonforfeitability" of the pension benefits question presents an interesting and technical question involving the role of rule making and the time by which affected pension managers must conform their practices to changes in the law as clarified and interpreted in the rule making process, the resolution of the issue by 1982, both by the agencies and by Bell's plan, limits the importance of the question to an earlier time. The case has no precedential significance, there is no conflict in the law among the circuits, and it does not raise a matter of public importance.

Respectfully sumbitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL, Plaintiff,	)	
vs.	)	No. Civ.-81-114T
SOUTHWESTERN BELL TELEPHONE COMPANY, Defendant.	)	

AFFIDAVIT OF THERESE F. PICK

STATE OF NEW JERSEY	:	
	:	ss:
COUNTY OF MORRIS	:	

THERESE F. PICK, being first duly sworn upon oath, deposes and states as follows:

1. My name is Therese F. Pick. I am the Director – Benefit Administration and Personnel Practices for American Telephone and Telegraph Company (AT&T). I have been in such position since August, 1971.

2. In my current position I am responsible for the administration and interpretation of Bell System benefit plans and programs which are maintained on a common national basis. Such plans include the Bell System Pension Plan, the Bell System Management Pension Plan, the Bell System Savings Plan for Salaried Employees, the Bell System Savings and Security Plan, and the Bell System Employee Stock Ownership Plan. I also provide interpretive advice and assistance to benefit administrators from the various Bell System companies, including Southwestern Bell Telephone Company (Southwestern Bell),

with respect to the administration and interpretation of the aforementioned benefit plans and programs and with respect to other benefit plans and programs which such companies separately maintain. Among such separately maintained plans and programs was the Southwestern Bell Plan for Employees' Pensions, Disability Benefits and Death Benefits (the former Southwestern Bell pension plan), which was merged into the Bell System Pension Plan and the Bell System Management Pension Plan as of October 1, 1980.

3. I am generally familiar with the operation and administration of all benefit programs throughout the Bell System. In performing my responsibilities, I am assisted by a staff of approximately 22 management and 4 non-management personnel, working under my direction and supervision.

4. AT&T established its Plan for Employee's Pensions, Disability Benefits and Death Benefits (the former AT&T pension plan) in 1913. Since that time, Southwestern Bell and other AT&T subsidiary and associated companies, which are commonly known as and comprise the Bell System, established and maintained plans similar in all material respects to that established and maintained by AT&T. All such plans were similar to one another in all material respects during the entire period of Carl Caldwell's employment by Southwestern Bell and until the date of their merger effective October 1, 1980.

5. The various Bell System companies, a list of which I have attached hereto and incorporate herein by reference, which established and maintained such pension plans entered into interchange of benefit obligation

agreements as early as January, 1913. Such agreements by and among AT&T, Southwestern Bell and other Bell System companies were, and are, identical in all material respects. (All the companies participating in such agreements are commonly known as "interchange companies.") The interchange agreements provide for the recognition of service credit for all benefit related purposes, including the eligibility for and computation of a pension, by AT&T and all such other interchange companies.

6. The various pension plans maintained by the Bell System companies have provided and continue to provide for the suspension of pension benefits upon the re-employment of a retired employee by the company from which he or she retired or by any other company with which such company had an interchange agreement except for re-employment by Rochester Telephone Company (Rochester) since January 1, 1980 or by Cincinnati Bell Inc. (Cincinnati) or Southern New England Telephone Company (SNET) since January 1, 1982. Until October 1, 1980, when Southwestern Bell's and other Bell System pension plans were merged into two new national plans established by AT&T, the various Bell System pension plans were maintained by each Bell System company with full reciprocity with respect to the interchange of benefit obligations and the suspension of pension benefits upon the re-employment of a retiree. Accordingly, all Bell System employees receive the benefit of reciprocal service credit recognition by all Bell System interchange companies and, until January 1, 1980, also by Rochester.

7. The former Southwestern Bell pension plan, as well as all other interchange company pension plans

except those of Cincinnati or SNET, were merged into the Bell System Pension Plan and the Bell System Management Plan as of October 1, 1980. As of such date, Mr. Carl Caldwell commenced to receive the pension benefit that he had previously received from the former Southwestern Bell pension plan from the Bell System Management Pension Plan. Such benefit was exactly the same in amount and all other respects immediately after the merger of the pension plans as it was immediately prior thereto and has remained the same until the date hereof except for an increase in Mr. Caldwell's monthly pension amount of $259.01 effective April 1, 1981. I have attached a list of all those Bell System companies which are participating in the Bell System Management Pension Plan. All such companies are either wholly owned, directly or indirectly, by AT&T, or are more than 80 percent owned, directly or indirectly, by AT&T.

8. Effective October 1, 1980, Cincinnati and SNET also adopted pension plans similar in all material respects to the Bell System Pension Plan and the Bell System Management Pension Plan. From and including such date, such plans of Cincinnati and SNET, together with the Bell System Pension Plan and the Bell System Management Pension Plan, provided and continue to provide for the interchange of benefit obligations in the same manner that the interchange of benefit obligations agreements did with respect to each company's former pension plan.

9. The interchange of benefit obligations agreement between the Bell System interchange companies and Rochester was terminated effective December 31, 1979. Accordingly, on and after January 1, 1980, there was no

longer interchange of benefit obligations between and among Rochester, AT&T and the rest of the Bell System except with respect to service related to employment prior to such date. Additionally, effective on and after January 1, 1980, the pension benefits of any employee covered by any Bell System company pension plan have not been subjected to suspension for re-employment by Rochester.

10. The interchange agreements by and among Cincinnati, SNET, AT&T and the rest of the Bell System remain in effect through the date hereof. However, effective January 1, 1982 the Bell System Pension Plan and the Bell System Management Pension Plan were amended to provide that the pension benefit of a retiree under either such plan is not subject to suspension upon the re-employment of such a retiree by either Cincinnati or SNET after the individual's normal retirement age (age 65). These amendments were in response to and in accordance with final regulations issued by the United States Department of Labor concerning the suspension of pension benefits upon the re-employment of a retiree. Such final regulations became effective January 1, 1982.

11. Although pension benefits of Bell System retirees have not been subject to suspension for re-employment after age 65 by Rochester since January 1, 1980 and by Cincinnati or SNET since January 1, 1982, I have asked members of my staff to ascertain to what extent and how many pensions have ever been suspended for re-employment of a Bell System retiree by Cincinnati, SNET or Rochester. Such members of my staff have spoken with officials of those companies and have determined that no Bell System retiree's pension benefit

has ever been suspended for re-employment by Cincinnati, SNET or Rochester.

12. The Bell System pension plans which existed prior to October 1, 1980, as well as the Bell System Pension Plan and the Bell System Management Pension Plan which became effective on October 1, 1980, are, and have been, recognized as "other than multi-employer" plans by the Internal Revenue Service (IRS) and the IRS has issued determinations of qualification under Section 401(a) of the Internal Revenue Code for such plans.

/s/ Therese F. Pick
Therese F. Pick

Sworn and subscribed to
before me this 19th day of
March, 1982.

/s/ Delpha M. Rosenkranz
DELPHA M. ROSENKRANZ
(NON-READABLE)

List of Interchange Companies

American Telephone and Telegraph Company
Bell Telephone Company of Pennsylvania
Bell Telephone Company of Nevada
Bell Telephone Laboratories, Incorporated
Chesapeake and Potomac Telephone Company
Chesapeake and Potomac Telephone Company of Maryland
Chesapeake and Potomac Telephone Company of Virginia
Chesapeake and Potomac Telephone Company of West Virginia
Cincinnati Bell Incorporated
Diamond State Telephone Company
Empire City Subway Company (Limited)
Illinois Bell Telephone Company

Indiana Bell Telephone Company, Incorporated
Malheur Home Telephone Company
Manufacturers' Junction Railway Company
Michigan Bell Telephone Company
Mountain States Telephone and Telegraph Company
Nassau Recycle Corporation
New England Telephone and Telegraph Company
New Jersey Bell Telephone Company
New York Telephone Company
Northwestern Bell Telephone Company
Ohio Bell Telephone Company
195 Broadway Corporation
Pacific Northwest Bell Telephone Company
Pacific Telephone and Telegraph Company
*Rochester Telephone Company
South Central Bell Telephone Company
Southern Bell Telephone and Telegraph Company
The Southern New England Telephone Company
Southwestern Bell Telephone Company
Teletype Corporation
Western Electric Company, Incorporated
Wisconsin Telephone Company
AT&T International, Inc.
Advanced Mobile Phone Service, Inc.
Western Electric International, Incorporated

*Participation in Interchange Agreements terminated as of December 31, 1979.

APPENDIX B

(SEAL) AT&T

Scott J. Macey
Attorney

American Telephone and
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295 North Maple Avenue
Basking Ridge, N.J. 07920
Phone (201) 221-6567

March 5, 1979

Office of Regulatory Standards and Exceptions
Pension and Welfare Benefit Programs
U.S. Department of Labor
Room C-4526
Washington, D.C. 20216

Re: *Proposed Regulation Section 2530.203-3*

Dear Sir or Madam:

The instant correspondence is in response to proposed regulations of the Department of Labor (the "Department") published in the Federal Register of December 19, 1978 regarding the circumstances pursuant to which a pension plan may suspend the payment of benefits to a retiree. These comments are submitted on behalf of American Telephone and Telegraph Company (AT&T) and other associated and subsidiary companies in the Bell System.

Although AT&T takes a positive view of many of the provisions of the Department's proposed regulation and commends the Department for clarifying many issues regarding the application of ERISA Section 203(a)(3)(B) with respect to the suspension of pension payments to a retiree who is reemployed, we do feel that such proposed

regulation needs further clarification in several significant respects. As a preliminary matter, it should be noted that the Bell System generally considers retirement on a pension as a permanent separation from System employment. However, we also recognize that a return to full or part-time employment may be desired or necessary under some circumstances. Accordingly, Bell System pension plans currently contain provisions for the suspension of benefits upon reemployment of a retiree by any Bell System company which is signatory to a System wide agreement for the interchange of pension obligations (i.e., recognition of all Bell System service by each company for purposes of participation, vesting an accrual) among Bell System companies. Such suspension provisions currently provide that a reemployed retiree's benefit will be permanently suspended for the prorated portion of a month in which the individual is reemployed.

As we consider retirement on a pension as a permanent separation from employment, we generally feel that it is important that such permanency be preserved in the interest of the efficient operations of our business and the administration of our benefit plans. Accordingly, the proposed regulations regarding the suspension of benefits upon reemployment of a retiree are of great concern to us and we would hope that they would not have a significant impact on the perspective of the work force in general and on the tens of thousands of retirees and pension eligible employees in particular with respect to the individual retirement decision.

Under section 2530.203-3 b)(1), a plan may permanently suspend pension benefits because of reemployment of a retiree if such individual completes 40 or more

hours of service for an employer which maintains the plan, including employment by an employer which is a member of a control group of corporations, another member of which is paying the pension. In our opinion, such a rule is overly restrictive and does not take full cognizance of economic realities. The Bell System is comprised of a number of associated and subsidiary companies, most of which are members of a control group of corporations within the meaning of Section 1563 of the Internal Revenue Code. However, certain associated Bell System companies, such as Southern New England Telephone Company and Cincinnati Bell, are not members of such control group. Nonetheless, these latter companies and other Bell System companies commonly participate in an arrangement whereby service for one such company is recognized by any other such company for which an individual is employed for purposes of pension plan participation, vesting and benefit accrual under essentially identical plans maintained by each company. A literal application of the proposed Department rule would not allow for the suspension of pension payments upon the reemployment of a retiree who is receiving a pension payment from one Bell System "interchange" company and who is reemployed by another such company. This is because the proposed regulation appears to restrict the suspension to instances of reemployment by an employer who maintains the *same plan* as the employer making the pension payments and who is also a member of the control group. We suggest an alternative rule which would give effect to the practice of the Bell System and other national multiple corporation groups and

which would allow for the suspension of pension payments upon reemployment by any member of such group if either (1) the current employer is a member of a control group of which the employer making the pension payments is also a member, or (2) the current employer and the employer making the pension payments credit an employee for service with each other for all purposes of participation, vesting and accrual, as long as, in either (1) or (2) above, the current employer and the employer making the pension payments maintain the same or similar plans.

In addition to the above, the proposed rule of Section 203-3(b)(1) is unrealistic in that, according to footnote 5 of the Supplementary Information, it would require the continuance of pension payments if a reemployed retiree were to be disabled from work and receive disability benefits from a plan maintained by the current employer. Reemployed retirees in the Bell System are essentially treated the same as all other employees and are, accordingly, eligible for disability benefits from company maintained sickness and accident disability plans. Any rule which prohibits the suspension of pension benefits if a reemployed retiree were to receive disability benefits would require the duplication of benefit payments and would be unfair to and inequitable for all other employees and retirees. Accordingly, we suggest a rule which either allows for the continued suspension of pension payments when a reemployed retiree receives disability payments from a company maintained plan or, in the alternative, allows such reemployed retiree to elect between receiving disability payments or returning to

retiree status and recommencing to receive retirement benefits.

Although we do not find the proposed 40 hour rule particularly troublesome, we would like to suggest an alternative. We believe that intermittent reemployment by a retiree should be discouraged both for purposes of plan administration and the efficient and economic operation of our business. Accordingly, although it is not current Bell System practice, we suggest that pension payments be allowed to be suspended for a full month for each month in which a retiree is reemployed for any amount of time. We believe that this would best take cognizance of economic realities and the purpose of retirement plans, and also discourage those retirees from pursuing reemployment who have no serious intent of remaining reemployed for any length of time. Any other rule may generate serious administrative and expense problems for employers and plan administrators.

With respect to the notification rules of proposed Section 203-3(b)(4), we feel that they are of particular significance for multi-employer plan participants and commend the Department for its proposal. However, we also feel that such notification requirements would be of little meaning to participants in single employer plans and suggest that such requirements not be applied to such plans or, in the alternative, more limited rules be applied to such plans. In any case, it is also suggested that notification to retirees of suspension rules be allowed to be accomplished either through the facility of summary plan descriptions or by providing a separate written explanation of the rules upon the application for

reemployment of any retiree. This would avoid the necessity of amending current summary plan descriptions and would satisfy the need for information concerning the suspension rule for those individuals who would be most concerned.

We also suggest that proposed Section 203-3(c)(1) be clarified to make it clear that any service by an employee who remains in active employment (i.e., has never retired) and (1) who is eligible for immediate payment of a pension upon termination from service, and (2) whose benefit has not yet commenced payment pursuant to ERISA Section 206(a), is not included within the definition of Section 203(a)(3)(B) service.

Finally, we suggest that the proposed regulations be clarified to specify that benefit accruals for prior service need not be adjusted for plan changes or wage increases subsequent to the initial commencement of a pension unless such changes would be applicable to retirees in general. We believe such rule to be consistent with existing IRS Regulations Section 1.411(c)-1(f) as well as the recently amended Age Discrimination in Employment Act and the Department's proposed Interpretive Bulletin thereunder. We also believe that any other rule would put an unfair and costly premium on reemployment to the detriment of all other employees and retirees. Finally, in suggesting such a clarification we are well aware of the minimum standard rules under ERISA regarding the recognition or bridging of prior service for current participation, vesting and accrual purposes and that such rules would apply in the case of reemployed retirees. Of course, we recognize that all plan changes and wage

increases during the period of reemployment, if otherwise applicable, would apply to pension accruals for such reemployment period.

We appreciate this opportunity to comment upon the proposed regulations and hope that these comments have been of some assistance to you in preparing final regulations on the subject of suspension of benefit payments. We would be happy to meet with you personally or respond in writing should you wish to discuss this matter further.

Very truly yours,

Scott J. Macey
Scott J. Macey
Attorney

APPENDIX C

P.O. BOX 3200 CHURCH STREET STA.
NEW YORK NY 10008

PLAN: PLAN FOR EMPLOYEES PENSIONS NAME DISABILITY BENEFITS AND DEATH BENEFITS

SOUTHWESTERN BELL TELEPHONE COMPANY
1010 PINE STREET
ST LOUIS, MO 63101

CASE NO 13911502EP
CONTROL DATE 04-12-79
FORM NO 5300
EMP ID NO 43-0529710
PLAN NO 001
FILE NO 130004588
DATE OF THIS LETTER
JUL 11 1979

Dear Applicant:

Based on the information supplied, we have made a favorable determination on your application identified above. Please keep this letter in your permanent records.

Continued qualification of the plan will depend on its effect in operation under its present form. (See section 1.401-1(b)(3) of the Income Tax Regulations.) The status of the plan in operation will be reviewed periodically.

The enclosed Publication 794 describes some events that could occur after you receive this letter that would automatically nullify it without specific notice from us. The publication also explains how operation of the plan may affect a favorable determination letter, and contains information about filing requirements.

This letter relates only to the status of your plan under the Internal Revenue Code. It is not a determination regarding the effect of other Federal or local statutes.

Please see Form 5616, enclosed, which is an integral part of this determination letter.

Sincerely yours,

Charles H. Breman
DISTRICT DIRECTOR

Enclosures:
Publication 794
Form 5616

APPENDIX D

EXCERPT'S FROM CALDWELL'S BRIEF IN CHIEF TO THE COURT OF APPEALS

D. THE LOWER COURT ERRED IN DENYING CALDWELL LEAVE TO AMEND HIS COMPLAINT

In the Court below, Caldwell sought to amend his Complaint in two particulars, based on information obtained during discovery. First, Caldwell sought to allege that the January 1, 1979, amendment to SWBT's pension plan was not properly adopted, and therefore SWBT could not, at any time, utilize the bona fide executive exemption to the ADEA, found at Title 29 U.S.C. § 631(c)(1), or freeze benefits at age 65 (29 C.F.R. § 860.120). Second, Caldwell attempted to amend his Complaint to allege that the Benefit Committee did not have a quorum on November 13, 1979, the date upon which it decided to retire Caldwell. These issues were initially raised in Caldwell's Amendment to Complaint and Request of Plaintiff to File Additional Amendments, filed on January 26, 1982. The lower court initially ruled that Caldwell's Motion had been rendered moot. See, Memorandum Opinion and Order, filed August 20, 1982. Caldwell renewed his Motion in Plaintiff's Motion to File Additional Amendments, filed on May 3, 1984, document no. 5. This Motion was denied by the court in its Memorandum Opinion and Qrder, filed May 22, 1986, document no. 49.

Rule 15(a), F.R.Civ.P. reads as follows:

> "Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

In reviewing the lower court's decision not to allow Caldwell to amend his complaint the Court should reverse if it finds that the court below abused its discretion. *United States Fidelity and Guaranty Company v. United States for the Use and Benefit of Contractor's Electric Supply, Inc.*, 389 F.2d 697 (10th Cir. 1968). Caldwell respectfully submits that the lower court abused its discretion when it denied him leave to amend his Complaint, and therefore, this Court should reverse the Order.

The basis, or any reasons for, the lower court's refusal to allow Caldwell to make the amendments was not set out in the opinion, and it is not apparent. Assuming that Caldwell could adequately prove that the January 1, 1979 amendments to the SWBT Plan designed to incorporate provisions deemed advisable as a result of the 1978 amendments to the ADEA, were *not* adopted in accordance with the formal requirements of that Plan, then there were no valid amendments and thus no *basis* on which to retire him. There is no valid reason why Caldwell should not be permitted to prove the allegation, which would have been included in the original complaint had the facts been known at that time. However, those facts were only subsequently discovered by Caldwell during discovery procedures. The ADEA requires that such valid provisions be contained in a pension plan. 29 U.S.C. § 623(f)(2).

The by laws of the benefit committee (likewise obtained by Caldwell in discovery procedures) provide, in Article III, that there be a quorum present before any effective action can be taken. See Addendum, Item 6. Caldwell's proposed amendment alleged that such a legally authorized quorum was not present when the

decision to retire him was made. Assuming he could adequately prove that allegation, then the retirement was illegal and he would be entitled to continued employment. There is no apparent reason why he should have been denied the right to prove the allegation.

Caldwell respectfully submits that the lower court abused its discretion when it refused to grant him leave to amend his Complaint. Therefore, this Court should reverse the Order of the lower court.

* * *

APPENDIX E

EXCERPTS FROM POSITION DESCRIPTION OF CALDWELL'S POSITION WITH BELL

Position No. 9319

POSITION DESCRIPTION

Job Title General Accounting Manager
State Oklahoma Dept. Comptrollers

* * *

Address 707 N. Robinson, Room 400,
Oklahoma City, Oklahoma
Supervisor's Title Director – Accounting Operations
Analysis By ___ Date ~~October 29, 1976~~
Concurrence: Incumbent /s/ Carl Caldwell
Supervisor /s/ K.N. Bensler

11-4-76

Job Summary

This position in Oklahoma carries statewide responsibility for all aspects of comptroller operations. This includes property and cost, payroll, revenue and data processing operations; including real time operations for CALL/OS (time share system for the Company and SORD, PLAN, TRPS, and DIRECT for both Arkansas and Oklahoma. This job is also responsible for supporting and participating in rate cases and other regulatory matters; timely and correct issuance of financial, tax, measurement and performance reports.

Job Duties and Responsibilities

10% A. Directs, guides and administers all payroll and property and cost activities in the Area.

* * *

10% B. Administers and directs revenue accounting operations to assure proper billing of customers and accountability of revenues collected.

* * *

20% C. Administers data processing services for the Oklahoma Area and certain applications for the Arkansas Area.

* * *

20% D. Directs, guides and advises on all matters related to personnel administration.

* * *

25% E. Administers and directs employees and participate in the following activities related to Area and Company revenues and earnings:

* * *

10% F. Directs and guides activities to assure that procedures are efficient and that information and data furnished to the customers and the operating departments are of high quality.

* * *

5% G. Participate in the following activities that are interdepartmental in nature and impacts all employees in the Area:

* * *

Scope and Nature of Supervision

A. Job Scope

1. The duties of this job are broadly assigned and the incumbent operates within the policies established at the officer level within the Company. The incumbent has very little direct guidance in the operations of his organization. Exerts wide discretion in administering the job and determining where

personnel should be utilized to achieve the most effective and productive results.

2. Actions are largely guided by practices, policies, experience and procedures. The incumbent must also be responsive and effective in dealing with needs of the Operating Departments. This position requires a thorough knowledge of accounting principles and a good working knowledge of the Operating Departments. A continuing challenge includes developing plans for new projects, such as, DIRECT, LMOS, LINIS, BISCUS/FACS, etc., and their effect on expense views, personnel requirements and office performance results.

3. This position reports to the Director – Accounting Operations. The incumbent works closely with the area Vice President and General Manager in projecting revenues and expenses, preparation for rate hearings and in formulating and implementing area policies.

4. Results are largely measured by various indexes, i.e., CAMP, CARE, billing service, payroll quality, expense per telephone, etc.

B. Job Sizing

Customer Accounts	866,000
Annual Expense Budget	$7.5 million
Subordinates	
Management	87
Non-Management	205
Total	292

APPENDIX F

PROPOSED AND FINAL REGULATIONS ON PERMISSIBLE SUSPENSION OF BENEFITS

A. Internal Revenue Service Final and Temporary Regulations Governing Pension, Profit Sharing and other Benefit Plans as of August 22, 1977, § 1.411(a)-4(2).

B. Proposed Amendment to Interpretive Bulletin and Regulations and Notice of Hearing. Issued by Department of Labor, Wage & Hour Division. (43 Fed. Reg. 58148). Dated December 12, 1978.

C. EEOC Age Discrimination Final Interpretations. (44 Fed. Reg. 86781). Dated November 21, 1979.

D. Proposed Department of Labor regulations on suspension of benefits to be codified at 29 C.F.R. § 2530.203-3 dated December 19, 1978 (43 F.R. 59098).

E. Department of Labor Notice of Final Regulations filed January 19, 1981, for 29 C.F.R. § 2530.203-3.

F. Department of Labor Notice of Final Regulations (amended) filed December 4, 1981, for same, effective January 1, 1982. (46 Fed.Reg. 59243)

G. Notice 82-83 of IRS, 1982-2 Cum. Bull. 752 dated December 3, 1982, providing that IRS qualified plans must be amended by the end of the first plan year beginning after 1983 with amendment to be effective January 1, 1982.